



Inquiry into final access determinations for fixed line services

Consultation and position paper

March 2019

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1. Introduction

1.1. Background

Fixed line services and wholesale ADSL services are supplied by Telstra over its copper public switched telephone network (PSTN) and digital subscriber line (DSL) network. They form an important input used by retail service providers to supply voice and broadband services to downstream fixed telecommunications markets.

The ACCC currently regulates fixed line services and the wholesale ADSL service under Part XIC of the *Competition and Consumer Act 2010 (Cth)* (CCA).

On 26 November 2018, the ACCC made a decision to extend the declaration of the following six fixed line telecommunications services until 30 June 2024:

- Unconditioned Local Loop Service (ULLS)
- Line Sharing Service (LSS)
- Wholesale Line Rental (WLR)
- Local Carriage Service (LCS)
- Fixed Originating Access Service (FOAS)
- Fixed Terminating Access Service (FTAS).

On 3 February 2017 the ACCC made a decision to extend the declaration of the wholesale ADSL service for five years, until 13 February 2022.

Once a service is declared, the ACCC can make regulated terms of access through a final access determination (FAD). A FAD can specify how an access provider is to comply with any or all of the standard access obligations.¹ These FAD terms and conditions will apply where there is no commercial agreement between an access seeker and the access provider.

The ACCC has made FADs that are currently in force for the declared fixed line services and wholesale ADSL service (the existing FADs). These FADs, all of which expire on 30 June 2019, outline price and non-price terms and conditions (NPTCs) of access to the declared services. Further details are outlined in the [FAD instruments](#).

On 12 December 2018, the ACCC commenced a public inquiry into making new FADs for the fixed line services and wholesale ADSL. At that time the ACCC also advised that it was undertaking a preliminary consultation on the next FAD and was seeking submissions by 25 January 2019.

The FAD inquiry will consider the price and NPTCs of access to the fixed line services and the wholesale ADSL service in light of submissions and other relevant considerations.

1.2. Purpose and consultation

This consultation and position paper seeks views on the ACCC's position to make new FADs for the fixed line services and wholesale ADSL services on the same terms of access as the existing FADs, to apply for five years until 30 June 2024. For clarity this means that all FADs prices for the declared services as at 30 June 2019 will apply for the duration of the new FADs.

¹ subsection 152BC(3) of the CCA.

Submissions are sought on the ACCC's position, specific questions raised in this document (see consolidated list at Attachment A) and any other matters stakeholders may wish to raise.

After considering any submissions, the ACCC will publish a final decision on this matter. At this stage, the ACCC does not propose publishing a draft decision prior to finalising this matter. If substantial issues are raised regarding the ACCC's position, the ACCC can undertake further consultation before making a final decision.

1.3. Making a submission

The ACCC encourages industry participants, other stakeholders and the public more generally to consider and make submissions on the issues set out in this consultation and position paper.

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'. Please do not use blacked-out text in case the text is retrievable. Further information regarding the ACCC's Confidentiality Guideline is available on the ACCC's website.² The ACCC expects that claims for commercial-in-confidence status of information by parties will be limited in nature to allow for the widest possible participation in the public inquiry.

The ACCC-AER information policy: the collection, use and disclosure of information sets out the general policy of the ACCC and the Australian Energy Regulator on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC's website.³

The ACCC prefers to receive submissions in electronic form, either in PDF or Microsoft Word format which allows the submission text to be searched.

Submissions are due on 26 April 2019.

Please email submissions and any questions you have concerning this consultation to:

fixedservices@acc.gov.au

2. Legislative framework

Once a service is declared, the ACCC is required to conduct a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make an access determination relating to access to the service. The inquiry must be commenced within 30 days after the declaration is made⁴ and concluded within six months of commencement, unless the ACCC publishes a written notice on its website to extend the decision making period by a further six months and explaining the reasons for the extension, pursuant to subsection 152BCK(3) of the CCA.

The ACCC must have regard to the matters specified in subsection 152BCA(1) of the CCA when making an FAD. These matters are:

² www.accc.gov.au/publications/communications-inquiries-submitting-confidential-material

³ www.accc.gov.au/publications/acc-aer-information-policy-collection-and-disclosure-of-information

⁴ subsection 152BCI(1) of the CCA.

- (a) whether the determination will promote the long term interests of end-users (LTIE) of carriage services or services supplied by means of carriage services
- (b) the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service
- (c) the interests of all persons who have rights to use the declared service
- (d) the direct costs of providing access to the declared service
- (e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- (f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- (g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

Subsection 152BCA(2) of the CCA sets out other matters that the ACCC may take into account in making FADs.

The ACCC may also take into account any other matters that it thinks are relevant when making an access determination.⁵

The ACCC also has the power to vary a FAD.⁶ In doing so, the ACCC must follow the same procedures as making a FAD, unless the variation is of a minor nature or the parties affected by the variation have consented to the variation.

Attachment B details the ACCC's assessment of its proposed approach to make new FADs for the declared services against the matters specified in subsection 152BCA.

3. The services in question

Summary details about the fixed line services and the wholesale ADSL service (which the ACCC is inquiring into making new FADs for) are outlined below.

3.1. Fixed line services

The declared fixed line services can be grouped as network access services, resale services and voice interconnection services.

3.1.1. Network access services

Network access services are wholesale services that provide access to Telstra's copper network. An access seeker can provide voice and/or broadband services to end-users through access to Telstra's copper network and by installing their own equipment in Telstra's exchanges.

There are two declared network access services:

- The unconditioned local loop service (ULLS) - This provides access to both the high and low frequency part of the copper line to allow access seekers to supply fixed voice, fixed broadband or a bundle of both.

⁵ subsection 152BCA(3) of the CCA.

⁶ Under subsection 33(3) of the *Acts Interpretation Act 1901* (Cth) subject to the changes specified in section 152BCN of the CCA.

- The line sharing service (LSS) - This allows use of the copper line to be shared by two parties by providing access to the high frequency part of the copper line only. This enables an access seeker to provide broadband only services to an end-user while voice services to that end-user are supplied by another service provider (typically Telstra).

The ULLS and LSS can be used by access seekers to supply products to other access seekers at the wholesale level (such as wholesale fixed voice services or wholesale fixed broadband services) or directly to end-users at the retail level.

3.1.2. Resale services

The wholesale line rental (WLR), local carriage service (LCS) and fixed originating access service (FOAS) (pre-selection and override), are wholesale inputs usually purchased as a bundle to allow an access seeker to supply traditional retail fixed voice services.

The WLR provides access to the low frequency part of the copper line to enable fixed voice calls and includes a dial tone and telephone number. The LCS involves the carriage of a telephone call from one end-user to another end-user in the same standard zone or local exchange area. FOAS pre-selection and override provide for the handover of telephone calls between network operators where the caller wants to use another service provider for particular services, such as international calls.

Purchase of the WLR, LCS (the two resale services) and FOAS (pre-selection and override) services, usually as a bundle, enables access seekers to provide a full suite of voice services to their retail customers (local, long distance, international and fixed-to-mobile calls).

Resale services enable access seekers to supply end-users with traditional fixed voice services without having to invest in their own equipment in Telstra's telephone exchanges.

3.1.3. Voice interconnection services

The fixed originating access service (FOAS) (special numbers⁷) and fixed terminating access service (FTAS) are used to allow the connection of fixed voice calls between end-users on different networks. These services support any-to-any connectivity between end-users. Access seekers predominately use FOAS and FTAS services to provide the following services:

- national long-distance calls
- international calls
- mobile phone to fixed network calls
- fixed network to mobile network calls
- local calls.

3.2. Wholesale ADSL service

Wholesale ADSL (ADSL and ADSL2+) is a technology for transmitting digital information at high data rates on existing copper phone lines. It is called asymmetric because the download and upload data rates are not symmetrical (that is, download is faster than upload). ADSL2+ is a version of ADSL that gives a higher data rate.

⁷ Call origination for the facilitation of 13/1300 and 1800 number services.

4. The 2015 FAD Inquiry

4.1. ACCC Decision

On 9 October 2015, the ACCC released its final decision on its fixed line service FAD inquiry to make the existing FADs for the six fixed line services and wholesale ADSL. The FADs incorporated both price and non-price terms and conditions which came into effect from 1 November 2015 with an expiration date of 30 June 2019.

The ACCC's final decision was a one-off 9.4 per cent reduction in the prices of the declared fixed line services. This decision reflected the ACCC's estimation of the prudent and efficient costs that should be recovered by Telstra for provision of its copper-based services.

The ACCC dealt with a number of complex issues in making these FADs including the unique circumstances of the rollout of the National Broadband Network (NBN) and its impact on Telstra's fixed line assets. In particular, the ACCC decision reflected a view that access seekers should not incur higher charges as a result of costs associated with arrangements in place between Telstra and NBN Co. These arrangements allowed for a commercially agreed shutdown and overbuild during the replacement of Telstra's copper network by the NBN network. Costs associated include expenditures related to the provision of services to NBN Co by Telstra as well as costs associated with asset redundancy and under-utilisation. In reaching this position the ACCC considered the commercial arrangements that Telstra entered into with NBN Co. These arrangements, known as the Definitive Agreements (DAs), include the lease and transfer of assets, the migration of services and the receipt of infrastructure and migration payments. The ACCC's assessment was that it was not in the LTIE for costs to be allocated to users of the fixed line services who did not cause under-utilisation of the network, given Telstra has been provided with an alternative avenue for cost recovery through revenue generated from the DAs entered into with NBN Co.

4.2. Judicial review

On 5 November 2015, Telstra applied to the Federal Court for judicial review of the ACCC's final decision on the fixed line services FAD.

On 28 March 2017, the Federal Court dismissed Telstra's application for judicial review. Telstra had sought review on the basis that the ACCC's decision would lead to under-recovery of costs. The court rejected all of Telstra's grounds for review.

5. ACCC preliminary consultations (December 2018)

The ACCC received four submissions (from Vocus, the Australian Small Business and Family Enterprise Ombudsman, Telstra and an anonymous respondent) in response to its December 2018 request for early submissions. The ACCC sought responses on issues concerning the next FADs, including the prices for the services and non-price terms and conditions of access.

These submissions can be accessed on the ACCC website.⁸

The ACCC has considered these submissions and other informal discussions with stakeholders in preparing this consultation and position paper.

⁸ www.accc.gov.au/regulated-infrastructure/communications/fixed-line-services/fixed-line-services-fad-inquiry-2018/preliminary-consultation

6. Key issues for the new FADs

The ACCC has identified a number of key issues that it needs to consider in making new FADs including determining prices and non-price terms and conditions of access for the declared services.

The ACCC's preliminary views on these issues are set out below. The ACCC is now seeking submissions on these and any other issues that are relevant to its consideration of new FADs for the declared services.

6.1. Pricing structure

6.1.1. Background

The ACCC in its 2015 FAD inquiry for the seven declared fixed line services applied a uniform price change to all declared services which maintained existing price relativities.

6.1.2. Preliminary submissions received

Telstra's preliminary submission⁹ suggested that existing price relativities for declared services in the existing FADs should be maintained in new FADs. Telstra suggests that introducing complexity into the next FAD should be avoided given that the NBN is expected to be completed during the next FAD period. According to Telstra, a move to more cost reflective pricing relativities would create price shocks and would mean higher prices for end users who remain on Telstra's legacy copper network.

6.1.3. Initial ACCC view

The ACCC considers that maintaining existing price relativities for declared services will provide a degree of stability to the industry in the lead up to and during the transition to the NBN. The ACCC's view is that stability in prices (and price relativities) for declared services will maintain efficient use of declared services investment in fixed line assets by Telstra and provide a more stable environment for access seekers as customers migrate to the NBN.

The ACCC considers that significant movements in relative prices could cause instability in the market for fixed line services. The ACCC notes that significant changes in price relativities could give access seekers incentives to change the way they supply services to end-users over Telstra's fixed line network. The ACCC considers, consistent with the views it expressed in its 2015 FAD decision, that significant changes in the way services are provided over the fixed line network, particularly in the lead up to the transition to the NBN, may not lead to efficient investment in infrastructure or efficient use of declared services.

The ACCC's proposed approach is to maintain existing price relativities for the declared services. In reaching this position, the ACCC has balanced the benefits of stability in relative prices with the potential short-term efficiency losses from prices diverging from their underlying costs in order to produce an outcome that will promote the LTIE.

The ACCC considers any efficiency losses as a consequence of not allowing price relativities to move with the cost relativities will be of relatively short duration. Furthermore, it considers that the benefits of stability in relative prices in promoting competition in the lead up to the completion of the NBN rollout are likely to outweigh any efficiency losses. This will also minimise incentives for access seekers to change the way they provide services to end

⁹ Telstra, *Telstra submission to ACCC fixed line services FAD preliminary consultation – Public*, January 2019, www.accc.gov.au/system/files/Telstra%20-%20public%20submission_0.pdf

users and allow for continued efficient use of infrastructure already in use, which will in turn promote efficient use of declared services.

6.2. Factors affecting costs of providing services and the appropriate regulated prices

There are a number of complex factors affecting the cost of providing fixed line and wholesale ADSL services.

6.2.1. Preliminary submissions received

Vocus preliminary submission outlines its view that the efficient and prudent costs of Telstra providing declared services should have decreased since the last FADs.¹⁰ Vocus' expectation is that regulated prices for these services should decrease and not continue at their current levels.

Telstra notes that updating the Fixed Line Service Model (FLSM) used to derive prices as part of the next FAD would be a complex and time consuming exercise. According to Telstra a full update of the model could not be completed before the current FAD expires in June 2019.

Telstra states that it has undertaken some preliminary updating of the FLSM which indicates that prices would need to increase significantly in order to generate its revenue entitlement under the model. Telstra has not disclosed why it considers prices should increase but supports a simple pricing approach, which would not require a full updating of the model and would provide price stability via a nominal rollover of prices or price increase reflecting movements in CPI.

The Australian Small Business and Family Enterprise Ombudsman preliminary submission¹¹ outlines its concerns that small businesses located in remote areas and dependent on fixed line services may incur price increases as a result in the decline of usage of the services in metropolitan areas.

6.2.2. Initial ACCC view

The ACCC's view is that it favours the continuation of existing prices for these services. The ACCC considers this would be in the LTIE by providing price stability to access seekers in the short lead up period prior to the completion of the NBN rollout, as well as reducing the regulatory burden on industry compared to a full reconsideration of the FLSM.

The ACCC also notes there is uncertainty about what the pricing outcomes would be if the ACCC were to update the model. Additionally the ACCC may need to redevelop the existing model or develop a new model for future pricing of Telstra's fixed line network.

In any event if the ACCC were to update the FLSM or develop a new model it would need to extend the current FAD inquiry by at least 12 months. This approach would also require a significant increase in resourcing for this project by industry. Associated costs with delay and subsequent resourcing demands are ultimately borne by end-users and in this matter would likely offset some of/or any potential gains attainable from reconsidering the model.

¹⁰ Vocus Group, *Preliminary submission to ACCC fixed line services final access determinations inquiry 2018 – Public*, January 2019, www.accc.gov.au/system/files/Vocus%20Group%20-%20public%20submission.pdf

¹¹ Australian Small Business and Family Enterprise Ombudsman, *Preliminary submission to Fixed line and wholesale ADSL services — final access determinations (FAD) inquiry 2018*, January 2019, www.accc.gov.au/system/files/Australian%20Small%20Business%20and%20Family%20Enterprise%20Ombudsman%20%28ASBFEO%29%20-%20public%20submission.pdf

Question 1

In light of the influences affecting the cost of providing services, is the LTIE best served by maintaining the current price levels in nominal terms for fixed line and wholesale ADSL services?

6.3. Duration of future FADs

6.3.1. Background

Access determinations must have an expiry date which aligns with the expiry date of the declaration for the relevant service unless there are circumstances that warrant a different expiry date.¹²

The six fixed line services are declared under the CCA until 30 June 2024 while the wholesale ADSL service is declared until 13 February 2022. Accordingly the ACCC will need to consider in the future if the declaration of the wholesale ADSL service should continue for the same time period as the six fixed line services.¹³

Given the above the ACCC needs to make a decision about the time period for the new FADs. If the ACCC were to set prices in the FADs for the entire five year declaration period for the declared services this would extend well beyond the expected timeframe for completion of the NBN rollout. NBN Co currently expect to complete the roll out of the NBN by 2020¹⁴ with 4.7 million premises currently activated and another 8.2 million premises ready for connection.¹⁵

The ACCC also notes that under the Australian Government's Universal Service Guarantee (USG) after the end of the NBN migration period Telstra's copper and wireless network will be used to provide voice services in NBN fixed wireless and satellite areas. Under a contract which extends until 2032, Telstra is obligated to supply fixed voice services on reasonable request, and supply, install and maintain payphones. Telstra must also maintain existing copper connections outside the NBN fixed line footprint. Telstra receives an annual payment of \$230 million (GST exclusive) to deliver fixed voice services and \$40 million (GST exclusive) to deliver payphone services.¹⁶

6.3.2. Preliminary submissions received

Vocus submits that FAD prices would be better determined by reference to pre and post NBN migration completion periods.¹⁷ Vocus also suggests that any decision on price in the post NBN migration period would be best determined using empirical data gathered on Telstra's costs at that time. This timing and process would ensure that regulated prices more closely reflect the efficient costs incurred by Telstra.

Telstra supports prices applying to a single period FAD, with that period aligning to the five year declaration period. Telstra considers that such pricing would provide long term stability and certainty for all industry participants at a time of significant migration to the NBN and reduced relevance of Telstra's legacy copper services. According to Telstra determining

¹² Subsection 152BCF(6) of the CCA.

¹³ The ACCC will need to consider whether the existing declaration of the Wholesale ADSL service should be remade, further extended, revoked, varied, allowed to expire or extended and then allowed to expire

¹⁴ www.nbnco.com.au/corporate-information/media-centre/media-statements/nbnco-corporate-plan-2019-2022

¹⁵ www.nbnco.com.au/content/dam/nbnco2/2018/documents/weekly-progress-reports/17012019.pdf

¹⁶ Department of Communications and the Arts, *Development of the Universal Service Guarantee – Summary Report*, DoCA, Canberra, 2018, p. 6.

¹⁷ Vocus Group, *Preliminary submission*, January 2019, www.accc.gov.au/system/files/Vocus%20Group%20-%20public%20submission.pdf

prices pre and post NBN migration would also add complexity, time and cost to the regulatory review process. It also notes that a new pricing approach for the post NBN migration period would need to be developed which may involve material price increases in higher cost areas which continue to be served by Telstra's legacy copper network.

6.3.3. Initial ACCC view

In determining the appropriate duration of the new FADs the ACCC has had consideration of the need to provide pricing stability and certainty to support industry investment and planning while also recognising the needs for flexibility to review prices and price structures when there are changes to industry circumstances.

The ACCC's view is that new FADs for the declared services should be made for five years which will align the expiry of the declared fixed line services and wholesale ADSL FADs. This will ensure consistency in the pricing approach for the declared fixed line services and the wholesale ADSL service which use many of the same network assets. This will provide a stable pricing environment which will also reduce the risk of the access provider over or under-recovering its costs of supplying those services.

The ACCC appreciates there are a number of factors affecting the future use and price of the declared services. The ACCC notes, however, that it is able to initiate an inquiry to vary an access determination at any time if it considers this is necessary.

Question 2

Should the ACCC set prices in the FAD for five years or a shorter period noting that a variation could be requested at a later date as the operational circumstances of the copper network in the post NBN migration period become clearer? Please explain the reasons for your view.

6.4. Fixed principles

6.4.1. Background

An access determination may contain 'fixed principles' provisions that lock in certain matters until a nominal termination date.¹⁸ Both price and non-price terms and conditions can be designated as fixed principles provisions. They are intended to give the ACCC the ability to provide regulatory certainty in certain circumstances.¹⁹

The existing FADs contain a set of fixed principles that apply until 30 June 2021. These fixed principles give form to the building block model (BBM) pricing methodology used by the ACCC to determine charges for Telstra's declared fixed line services methodology by identifying how certain pricing inputs within the BBM framework should be determined and used to estimate prices. In particular, the BBM pricing methodology estimates prices that are based on efficiently incurred costs and enables the access provider to recover those efficiently incurred costs, including a commercial return on its investment.

6.4.2. Preliminary submissions received

According to Telstra fixed principle provisions have provided certainty and transparency to the ACCC's approach to key aspects of FADs, particularly its pricing approach. However, Telstra considers the current fixed line principles and building block model were not

¹⁸ Section 152BCD(1) of the CCA

¹⁹ Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (Cth), p. 144.

designed for 'end of network life' or customer migration as key considerations. Telstra argues, however, that if the current fixed principles are to expire and the FLSM is discontinued, the ACCC should examine how best to provide guidance on how it will approach pricing for fixed line services in future FAD processes.

6.4.3. Initial ACCC view

The 2019 FADs for the declared services will come into force before the termination date specified in the fixed principles. Therefore, the ACCC must include the same fixed principles provisions in the new FADs for this period.²⁰

The existing fixed principle provisions will, however, expire on 30 June 2021 while the new FADs are not proposed to expire for another 3 years; that is, 30 June 2024. Therefore the ACCC needs to decide how it should treat the existing fixed principles in the first two years of the FADs and whether it should make new fixed principles to cover the full five year period of the new FADs.

In making the existing FADs, the ACCC applied the existing fixed principles and continued the BBM but departed from two of the building blocks (RAB disposals and cost allocations) to avoid costs caused by the NBN migration being passed onto wholesale customers in circumstances where Telstra was being paid compensation by the Commonwealth. The ACCC regarded this application of the fixed principles as subject to the LTIE assessment and that position was upheld on appeal to the Federal Court.

The ACCC is of the view that it is not in the LTIE to apply the fixed principles for the first two years of the regulatory period for new FADS and is not proposing to update the FLSM.

The ACCC also has some concerns about making new fixed principles. The ACCC considers there is significant uncertainty about what the supply and demand for the declared services will be after the existing fixed principles expire. In particular it notes that the roll-out of the NBN is still proceeding with rapidly declining numbers of users on Telstra's copper network. The ACCC also notes Telstra's comments that the current fixed principles and BBM were not designed to apply to a network nearing its 'end of life'. This environment makes it difficult for the ACCC to provide further guidance on future pricing for fixed line services. Therefore at this time the ACCC does not consider it appropriate to develop new fixed principles for the FADs.

Question 3

Do you have any concerns in relation to ACCC's views about the usefulness of the existing fixed principles for future FADs pricing?

6.5. Non-price terms and conditions

6.5.1. Background

The ACCC can specify in an access determination some or all of the terms and conditions on which a carrier is to provide an access seeker with access to the declared service. These terms and conditions can take the form of price or NPTCs.

NPTCs cover a broad scope as there can be many non-price aspects of access to the declared service. These can range from commercial terms, such as billing to general dispute resolution processes, to the operational processes by which the declared services are to be accessed.

²⁰ Section 152BCD(3) of the CCA

In making the existing FAD the ACCC's approach involved making a targeted set of NPTCs focussing only on those aspects of access where commercial agreement is less likely to result and where specific competition concerns are likely to arise. This can be contrasted to a Comprehensive FAD which is a comprehensive set of NPTCs for all aspects of access required to provide certainty in the absence of any access agreement.

6.5.2. Common and Specific Service NPTCs

The existing FADs contain a number of common NPTCs which apply to all declared services together with some NPTC that are specific to particular services.

The NPTCs in the existing FAD cover the following areas.

- Billing and notification (Schedule 3)
- Creditworthiness and Security (Schedule 4)
- General dispute resolution procedures (Schedule 5)
- Confidentiality provisions (including disclosure of confidential information to regulators) (Schedule 6)
- Suspension and termination (Schedule 7)
- Liability and Indemnity (Schedule 8)
- Communication with end users (Schedule 9)
- Network modernisation and upgrade (Schedule 10)
- Changes to operating manuals (Schedule 11)
- Resale services (Wholesale ADSL only) (Schedule 12)
- Ordering and provisioning (Managed Network Migrations to the ULLS and the LSS) (Schedule 13(a))
- New ULLS ordering and provisioning processes (LSS to ULLS Transfer processes) (Schedule 13(b))
- Recourse to regulated terms (Schedule 14).

Further details about specific NPTCs in the existing FADs are outlined in the [FAD instruments](#).

6.5.3. Initial ACCC view

The ACCC's understanding is that there does not appear to be widespread problems with the targeted set of NPTCs in the existing FADs. The ACCC considers that a FAD, which sets out a comprehensive set of all terms and conditions of access, would represent a significant regulatory burden on both industry and the ACCC in developing, consulting on and ensuring compliance with such a FAD. The ACCC therefore supports the continued use of the existing NPTCs in new FADs.

The ACCC considers this approach will promote the LTIE by ensuring, on an as needs basis, that there is a regulatory fall back for specific matters that have typically raised competition concerns or have been the subject of disputation between the parties.

The ACCC also notes that it has previously had regard to the matters specified in subsection 152BCA of the CCA in approving the existing NPTCs in FADs for the declared services.²¹

Question 4

Do you have any concerns about the operation of existing NPTCs in FADs? Are there any NPTCs that the ACCC should introduce into new FADs? Please explain the reasons for your view.

6.6. Other

Question 5

Do you have any concerns about the ACCC's proposed approach to making new FADs for the declared services given the matters the ACCC is required to consider when making new FADs under the CCA? Please explain the reasons for your view.

Question 6

Are there any additional issues or views that you consider are relevant to price and non-price terms for access to the declared services?

²¹ See in particular section 2.2 and Chapter 7 of ACCC, *Draft decision on Non-price terms and conditions and connection charges for fixed line services*, March 2015, www.accc.gov.au/system/files/MEA-draft%20-%20MASTER%20Draft%20decision%20on%20NPTC%20%20FOR%20PUBLICATION%20-%20March%202015_Redacted.pdf

7. The ACCC's position

In the context of a changing market, the ACCC's position is that the LTIE will be promoted by the continuation of existing price and access terms for the six declared fixed line services and wholesale ADSL for the next five years.

As explored in this paper, the ACCC has considered the risks and benefits of proceeding with such an approach. Key factors considered include:

- the roll-out of the NBN
- the rapidly declining number of users of Telstra's copper network
- scope and payments to Telstra for its USG responsibilities

The ACCC considers there is some uncertainty about what the pricing outcomes would be if the ACCC were to update the model. Additionally the ACCC may need to redevelop the existing model or develop a new model for future pricing of Telstra's fixed line network. In any event if the ACCC were to undertake a full update of the FLSM or develop a new model it would need to extend the current FAD inquiry by at least 12 months which the ACCC is not convinced is in the LTIE.

The ACCC is not aware of any significant concerns about the operation of existing NPTCs in FADs but welcomes feedback from access seekers in relation to the effectiveness of NPTCs under the existing FADs.

As explored above at 6.5, maintenance of existing NPTCs will provide access seekers ongoing certainty to continue with existing access arrangements. In addition, an efficient FAD decision process and subsequent outcome allows industry greater capacity to respond to new and emerging markets and relevant regulatory processes. These may include, but are not limited to the roll out of NBN, future policy decisions about the NBN and the introduction of 5G services.

The ACCC considers there are likely to be potentially significant costs to the industry if the ACCC was to undertake a full update of the FLSM or develop a new model in making new FADs, these include:

- indirect costs associated with the decision making process, including professional fees and court costs
- delay, at a time when the migration away from the fixed lines services is nearing completion
- increased regulatory burden and/or limited engagement from stakeholders, who have other consultation obligations and policy debates to engage in
- diminishing returns for stakeholders engaged on the review, as potential customers on the fixed line footprint decline and leave to explore other technologies, including NBN and 5G services

The ACCC also recognises that a variety of complex factors affect the use and price of fixed line services and it is possible that regulated prices for these services may diverge from the prudent and efficient cost of providing them. The ACCC would therefore be prepared to consider undertaking a variation inquiry for the new FADs if there was evidence that this was required. As noted above, the legislative framework allows this to occur.

In conclusion, it is the view of the ACCC that, subject to consultation with stakeholders, the position of maintaining current price levels in nominal terms is both sound and the most

appropriate approach considering the factors outlined above. The ACCC welcomes stakeholder engagement on this and other observations made in the discussion paper.

8. Next steps

Following this consultation, the ACCC will consider submissions and determine whether further consultation is needed, or whether it can move to a final decision on the FADs.

Attachment A - Consolidated list of questions

Question 1

In light of the influences affecting the cost of providing services, is the LTIE best served by maintaining the current price levels in nominal terms for fixed line and wholesale ADSL services?

Question 2

Should the ACCC set prices in the FAD for five years or a shorter period noting that a variation could be requested at a later date as the operational circumstances of the copper network in the post NBN migration period become clearer? Please explain the reasons for your view.

Question 3

Do you have any concerns in relation to ACCC's views about the usefulness of the existing fixed principles for future FADs pricing?

Question 4

Do you have any concerns about the operation of existing NPTCs in FADs? Are there any NPTCs that the ACCC should introduce into new FADs? Please explain the reasons for your view.

Question 5

Do you have any concerns about the ACCC's proposed approach to making new FADs for the declared services given the matters the ACCC is required to consider when making new FADs under the CCA? Please explain the reasons for your view.

Question 6

Are there any additional issues or views that you consider are relevant to price and non-price terms for access to the declared services?

Attachment B – ACCC’s assessment of proposed approach against section 152BCA

Under section 152BCA, the ACCC must have regard to the matters specified in subsection 152BCA(1) of the CCA when making a FAD. These matters are:

- (a) whether the determination will promote the LTIE of carriage services or services supplied by means of carriage services
- (b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier’s or provider’s investment in facilities used to supply the declared service
- (c) the interests of all persons who have rights to use the declared service
- (d) the direct costs of providing access to the declared service
- (e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else
- (f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility
- (g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

Further clarification of the meaning that the ACCC attaches to each of the relevant legislative criteria is outlined in the ACCC’s 2015 final decision on its inquiry to make FADs for the declared fixed line services.²²

The ACCC’s proposed approach to making new FADs is to maintain the existing pricing and NPTCs. This attachment describes the assessment of the proposed approach to making new FADs against the abovementioned matters.

Paragraph 152BCA(1)(a)

Maintaining the existing pricing and NPTCs is in the LTIE because of the avoidance of price shocks, and reduced complexity and cost in updating the FLSM or developing a new model. Furthermore, avoidance of delays in making a final decision for the FADs is in the LTIE because it gives a degree of certainty. The ACCC also has regard to whether the terms and conditions are likely to result in:

- a. Promoting competition
- b. Achieving any-to-any connectivity
- c. Encouraging the economically efficient use of, and economically efficient investment in:
 - i. The infrastructure by which listed carriage services are applied

²² See in particular Appendix A from ACCC, *Public inquiry into final access determinations for fixed line services - Final Decision*, October 2015, www.accc.gov.au/system/files/FSR%20FAD%20Final%20Decision%20Report%20-%20Public%20Version.pdf

- ii. Any other infrastructure by which listed services are, or are likely to become, capable of being supplied

The ACCC considers relevant markets for declared fixed line services include: retail and wholesale supply of voice services (excluding VoIP and mobile originated calls); retail and wholesale supply of broadband; and, retail supply of a bundle of voice and broadband services.²³ Maintaining the existing terms is likely to continue promoting a competitive environment for the related markets in the next period given the same price and expected quality of service.

The ACCC considers that a five year FAD duration will give regulatory certainty and promote the achievement of any-to-any connectivity in relation to carriage services that involve communication between end-users.

Maintaining price relativities for the declared services, which use many of the same network assets, will promote an efficient level of investment in the infrastructure for the remaining end users. This will also provide a more stable environment for access seekers as customers migrate to the NBN. Changes in price relativities could give access seekers incentives to change the way they supply services to end users over Telstra's fixed line network.

Paragraph 152BCA(1)(b) & Paragraph 152BCA(1)(c)

The ACCC acknowledges that access providers need to recover efficient costs incurred in providing the declared services. Similarly access seekers should only have to pay reasonable prices for access to the declared services. The ACCC's initial view is to consult on whether maintenance of the current prices is a fair and reasonable balance between the two considerations, having regard to the costs, time and uncertainty avoided by not updating the FLSM or developing a new model for future pricing of Telstra's fixed line network.

The ACCC welcomes the views of access providers and access seekers on whether maintaining current prices for the declared services is a material concern.

Paragraph 152BCA(1)(d) & Paragraph 152BCA(1)(g)

The ACCC assessed these matters in arriving at the current prices in its 2015 final FAD decision and is satisfied that the current prices allowed Telstra to recover its costs.

The ACCC also notes that the NBN rollout is reaching completion largely replacing the copper network to which FAD prices apply. Maintaining existing prices will assist the operability of the network and reduce regulatory costs at a time when the number of regulated services in operation are rapidly declining.

The ACCC is consulting on whether the full costs of updating the FLSM or developing a new model need to be incurred or whether maintenance of the current prices is a reasonable outcome for all parties.

Paragraph 152BCA(1)(e) & Paragraph 152BCA(1)(f)

The ACCC considered these issues in its 2015 final FAD decision and the ACCC's initial view is that there are no new issues that need to be taken into account on this occasion.

In particular in its 2015 final FAD decision the ACCC expressed its view that the value to parties of installations is confined to the provision of the declared services by Telstra to the access seekers. It also noted that current charges for the services appropriately account for

²³ ACCC, *Public inquiry into final access determinations for fixed line services* - Final Decision, October 2015, p. 233

the costs borne by different parties.²⁴ The ACCC also reached a view, that current FAD prices would not compromise the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility.²⁵

After considering the factors in subsection 152BCA(1) of the CCA, the ACCC's initial view is that it considers that maintaining existing FADs price and non-price terms and conditions in new FADs is in the LTIE.

²⁴ ACCC, *Public inquiry into final access determinations for fixed line services* - Final Decision, October 2015, p. 208

²⁵ *Ibid.*